EX PARTE OR LATE FILED

ORIGINAL

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES
NEW YORK

1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711

HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

FOUNDED 1866

WRITER'S DIRECT NUMBER
(202) 736-8132

WRITER'S E-MAIL ADDRESS
pkeisler@sidley.com

May 19, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: *GTE Corp. and Bell Atlantic Corp., CC Docket No. 98-184*

Dear Ms. Salas:

Enclosed is a copy of a letter to Commissioner Tristani to be placed in the public record in the above-referenced proceeding. Please contact me if you have any questions.

Respectfully submitted,

Peter D. Keisler

Peter D. Keisler

ORIGINAL

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES
NEW YORK

1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711

HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

FOUNDED 1866

WRITER'S DIRECT NUMBER
(202) 736-8132

WRITER'S E-MAIL ADDRESS
pkeisler@sidley.com

May 19, 2000

Honorable Gloria Tristani
Commissioner
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

ORIGINAL

Re: *GTE Corp. and Bell Atlantic Corp., CC Docket No. 98-184*

Dear Commissioner Tristani:

This letter to responds to your request at the May 15, 2000 debate in your office for additional briefing on two issues: (1) the applicable precedent under the MFJ, and (2) whether Section 3(1) of the Act, which defines "affiliate," can be given different constructions for the different provisions of the Act in which the term "affiliate" appears. It also responds to Mr. Michael E. Glover's *ex parte* letter to you of May 18, 2000 ("May 18 Letter"), on the same subjects (and, in part, to related *ex partes* filed by Bell Atlantic and GTE ("Applicants") on May 11, 12, and 16, 2000).

1. *The MFJ.* Judge Greene addressed the permissibility of BOCs owning options in long distance carriers in *United States v. Western Elec. Co.*, Civ. Action No. 82-192, slip op. (D.D.C. Aug. 7, 1986) ("*Tel-Optik*"). As the D.C. Circuit explained (in the appeal of that decision), Judge Greene held that some such options were permissible under the MFJ and some were not. *United States v. Western Elec. Co.*, 894 F.2d 430, 434 (D.C. Cir. 1990) (citations omitted). Whether an option was permissible under the MFJ depended on a three-part test under which the option, to be allowed, had to satisfy each part of the test. *See id.* at 434 n.5. More specifically, a BOC was permitted to acquire an option in a long distance carrier under the MFJ only if (1) the investment in the conditional interest was "minor"; (2) the exercise of the conditional interest was "genuinely in question"; and (3) the interest would give the BOC no ability or incentive to discriminate. *See id.*; *Tel-Optik*, slip op. at 5-7.[1]

[1] Judge Greene's requirement that conditional interests be "minor" appears to have had a purpose similar to the 10% cap in Section 3(1) – *i.e.*, to exclude from the prohibition investments that

(continued . . .)

Applicants' proposal in this proceeding would not satisfy even the first prong of the test. Judge Greene held that *Tel-Optik* was a "close case" and that the size of NYNEX's $10 million investment in a long distance carrier (relative to NYNEX's $2 billion in revenues) "may be deemed to fall just within the category of investments that the Court is prepared to regard as 'minor.'" *Tel-Optik*, slip op. at 6. Here, the Class B shares being obtained by Verizon would be worth approximately $8 billion – 800 times larger.[2] In order to be in the same range as in *Tel-Optik*, Applicants would need have to have annual revenues of $1.6 trillion – an amount in excess of the federal budget.[3] Applicants combined revenues, of course, are nowhere near that level. Bell Atlantic-GTE Joint Proxy Statement, at 9-10 (Apr. 14, 1999).

(. . . continued)
might be deemed to have only a *de minimus* effect on a BOC's incentives. His method was slightly different, however, from the method later adopted by the Act: Judge Greene measured the *de minimus* range by looking at the size of the investment relative to the BOC's revenues, while Section 3(1)'s 10% cap looks at the investment relative to the size of the company in which the BOC wishes to invest.

Applicants' suggestion in their May 18 Letter (p. 4) that the first prong of the *Tel-Optik* test derives from the MFJ Court's decision in *United States* v. *Western Elec. Co.*, 592 F. Supp. 846, 871-872 (D.D.C. 1984) – and was simply designed to ensure that the BOCs focus their attention on providing local service – is incorrect. The original MFJ, in addition to prohibiting BOCs from providing interexchange services or engaging in equipment manufacturing, also prohibited BOCs from providing "any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." *United States* v. *Western Elec. Co.*, 552 F. Supp. 131, 227-228 (D.D.C. 1982). While this "non-regulated business" restriction was later eliminated, the 1984 decision Applicants cite was issued while it was in effect, and involved a range of waiver requests – many of which were for non-regulated businesses (such as U S WEST's request to provide real estate services). *United States* v. *Western Elec. Co.*, 592 F. Supp. at 850-851 & n.3. Judge Greene did indicate in his decision that, in order to prevent the BOCs from diverting their attention away from local service, he would not grant waivers that in the aggregate exceeded a certain level of investment by the BOC. *See id.* at 871-72. However, he was on that point addressing waivers of the non-regulated business restriction, not waivers of the interexchange restriction. In the immediately preceding section of his opinion, he indicated that he would not grant *any* waivers of the interexchange restriction – the restriction at issue here and in *Tel-Optik* – until the BOCs "lose their local monopolies and there is substantial competition in local telecommunications service." S*ee id.* at 867-68. Thus, the concern that the BOCs not divert their attention away from local service was not relevant in *Tel-Optik*, or to options in long-distance carriers generally.

[2] Applicants do not deny that the Class B shares that they would obtain would be approximately 80% of Genuity's value. *See generally* AT&T Opp. to Revised Proposal, at 15-16 (May 5, 2000); Declaration of Dr. Richard Clarke ¶¶ 3-11 (May 5, 2000). Further, Applicants have claimed to the Commission Staff that Genuity's "market value" is approximately $10 billion. Thus, GTE's net investment in Genuity is approximately $8 billion.

[3] http://www.kowaldesign.com/budget/budg0.html.

Further, Applicants cannot be heard to claim that their investment in Genuity is "minor" while at the same time claiming that the possibility of losing this investment creates "a powerful new incentive for [Applicants] to complete the 271 process." Response of Bell Atlantic and GTE in Support of their Further Submissions at 39-40. Clearly, the loss of a "minor" investment cannot create a "big[] stick to spur 271 compliance." *Id.* at 40.[4]

Applicants nonetheless contend in their May 18 Letter that they would satisfy the first prong of the *Tel-Optik* test because Genuity's revenues are $700 million and the combined Bell Atlantic/GTE revenues in 1999 were $56 billion. That analysis is erroneous in two respects. First, in determining whether an investment was minor, Judge Greene examined the value of the BOC option, not the revenues of the company in which the option investment was made. The value of the option here is far more than $700 million. Indeed, in addressing the *Tel-Optik* test, Applicants previously pegged the value of the option at $1.3 billion,[5] and, as shown above, it is really more like $8 billion. Second, even if the relevant figure were $700 million, the ratio of investment to BOC revenues that Judge Greene found to be "just within the category of investments that the Court is prepared to regard as 'minor'" was 1 to 200 ($10 million to $2 billion), and a $700 million option would fall within that ratio only if Applicants' combined revenues were $140 billion.

Applicants' May 18 Letter thus strives to make the MFJ relevant to this proceeding *without* endorsing the holding of *Tel-Optik*. Applicants therefore urge the Commission to disregard that holding and rely instead on a passage written by Judge Greene in *Tel-Optik* in which, Applicants claim:

> Judge Greene expressly contrasted the acquisition of an option, which "shall not" require "the approval of the Court," with the "actual acquisition by a Regional Holding Company of an equity interest in an entity engaged in activities prohibited by the decree [which] may not occur without a waiver granted by the Court."

May 18 Letter at 2 (citing *Tel-Optik*, slip op. at 6). Applicants claim that Congress in Section 3(1) of the Communications Act codified case law interpreting the definition of "affiliate" under the MFJ – which, like the Act, uses the term "equity interest (or the equivalent thereof)" -- and

---

[4] AT&T has previously explained why the exercise of this "option" is not "genuinely in question" (the second prong of the *Tel-Optik* test) and why Verizon, if it held the option, would have the incentive and ability to discriminate against unaffiliated interLATA service providers (the third prong). *See* Opposition of AT&T Corp. to Applicants' Revised Proposal Regarding GTE's InterLATA Operations, pp. 10-17, 31 (May 5, 2000)). We will not repeat that analysis here, but incorporate it by reference. Thus, while an option had to satisfy *each* of the three parts of Judge Greene's test to be permissible, Applicants' interest in Genuity would satisfy none of them.

[5] *See* Response of Bell Atlantic and GTE, at 13 (Feb. 22, 2000).

therefore codified this passage from *Tel-Optik* and the distinction between "options" and "equity" which they claim Judge Greene made in it it.

Applicants' argument, therefore, is that Congress rejected Judge Greene's actual *holding* in *Tel-Optik* but nonetheless adopted his *use of language* in that opinion for purposes of understanding the term "equity." That attributes an exceptionally subtle intent to Congress, to say the least, and we are aware of no instance in which a court has adopted such a view. Even if Applicants could get past the unnatural nature of their claim, however, it would fail for two additional reasons.

First, these sentences were not holdings purporting to construe the term "equity interest (or the equivalent thereof)" as that term was used in the MFJ definition of "affiliate." Indeed, those sentences do not mention, much less construe, the term "equivalent" at all. That is because Judge Greene in *Tel-Optik* was not interpreting the MFJ's definition of "affiliate." The MFJ defined the term "affiliate" only for purposes of whether an entity was an "affiliate" of *AT&T*. MFJ § IV(A). Rather, in *Tel-Optik* Judge Greene was called on to determine whether the conditional interest NYNEX purchased in a long distance carrier violated Section II(D) of the MFJ, which prohibits a BOC or "any affiliated enterprise" – a phrase not defined in the MFJ – from providing long distance service. Thus, even if Applicants are correct that Congress codified the MFJ term "affiliate," they have cited no MFJ cases (and we are aware of none), actually applying that term or construing the phrase "equity interest (or the equivalent thereof)."

Second, and in any event, the actual sentences Judge Greene wrote in the passage Applicants cite undermine rather than support their position, for Applicants have provided their excerpt in a substantially misleading fashion. Judge Greene did *not* hold, as Applicants maintain, that "acquisition of an option" would not require the approval of the Court. *See* May 18, 2000 Letter at 2. Instead, Judge Greene held that approval was not required for those options – and only those options – *that passed the three-part test*. *Id.* at 5. All other BOC options in long distance carriers were prohibited by the MFJ (absent a waiver). *Id.* at 4-5. Applicants have simply mischaracterized the passage to make it appear that Judge Greene held that BOC options in long distance carriers were never prohibited by the MFJ when in fact they generally were prohibited.

Applicants fare no better with regard to the second sentence they quote. That passage indicates that Judge Greene believed that many options were in fact equity interests. Judge Greene stated "*as discussed below*, the actual acquisition by a Regional Holding Company of an equity interest in an entity engaged in activities prohibited by the decree may not occur without a wavier granted by the Court." *Tel-Optik*, slip op. at 6 (emphasis added). What Judge Greene "discussed below" was application of the three-part test. *Id.* at 6-7. Thus, the passage cited by Applicants indicates that Judge Greene believed that conditional interests that did not pass the three-part test constituted the "actual acquisition . . . of an equity interest" because they gave the BOC non-trivial ownership interests in a long distance carrier.

This analysis also shows why Applicants' earlier *ex parte*'s citation of pleadings in the context of the option acquired by Ameritech was flawed. *See* May 12, 2000 *Ex Parte*, Tab 2. Applicants there noted that some parties had maintained that options approved by the Justice

Department would impermissibly give the BOCs an equity interest in prohibited businesses and asked the Decree Court to overrule the Justice Department. Those parties were contending that the option acquired by Ameritech failed Judge Greene's three-part test and therefore would give Ameritech an equity interest in a long distance carrier. *See id.* Tabs B & C. Thus, these pleadings confirm that Judge Greene held that options that cannot pass his three-part test were equity interests.

Applicants note that these parties' protests were "not granted" by Judge Greene, implying they were denied. *See id.*, Tab 2. That implication is incorrect. Rather, in the *Tel-Optik* case, Judge Greene directed the Department of Justice ("DOJ") to first pass on whether a BOC's acquisition of a conditional interest passed his three-part test. *Tel-Optik*, slip op. at 5. The pleadings cited by Applicants were protests from the DOJ's finding that the Ameritech option satisfied Judge Greene's three-part test. Judge Greene never acted on these protests because the Court of Appeals invalidated the procedures adopted in *Tel-Optik* in which the DOJ was required to first pass on the legitimacy of acquiring the option. *United States v. Western Elec. Co.*, 894 F.2d 430, 434 (D.C. Cir. 1990). Thus, these protests were neither granted *nor* denied.[6]

In sum: (1) Applicants have cited no MFJ precedent even purporting to construe the term "equity (or the equivalent thereof)," but (2) under the MFJ precedent that does address the issue of the permissibility of BOC options in long distance carrier carriers, Applicants' proposal would have been unlawful.

2. *The need for a single consistent interpretation of Section 3(1).* We also disagree with Applicants' contention that Section 3(1)'s definition of "affiliate" – and the words "own," "control," and "equity" that are used in that definition – can vary depending on the particular provision of the Act in which the term "affiliate" is used. Section 3(1) is part of the "Definitions" section of the Act. It provides a single, uniform definition of the term "affiliate" that applies simultaneously to numerous provisions of the Act. However those terms are interpreted here, they will have to be applied in the same way for each of the dozen or so other provisions to which Section 3(1)'s terms apply.

That principle is underscored by the fact that, where Congress wished to adopt a separate, provision-specific definition of "affiliate," it did so. For example, in Section 274, which addresses electronic publishing, Congress decided not to use the definition of affiliate contained in Section 3(1) and instead adopted a definition that did not establish affiliation based on "equity (or its equivalent)" or contain a 10 percent safe harbor. *See* 47 U.S.C. § 274(i)(1). Likewise, in Section 273, which addresses manufacturing, Congress modified the definition of affiliate in Section 3(1) such that certain "voting equity interest[s]" in BellCore, which would not be

---

[6] Applicants make this same mistake when they cite options acquired by Ameritech, Pacific Telesis, Southwestern Bell and Bell South as "approved under the MFJ regime." May 12, 2000 *Ex Parte*, at Tabs C-K. Those options were never approved by Judge Greene and, as noted, the process by which the DOJ gave preliminary approval to these options was struck down by the Court of Appeals. The only conditional interest approved by Judge Greene was the option acquired by NYNEX in *Tel-Optik*.

sufficient to establish affiliation under Section 3(1), would establish affiliation for purposes of Section 273. *See* 47 U.S.C. § 273(d)(8)(A). By contrast, Congress did not tailor a separate definition of "affiliate" for Section 271, but instead relied upon the general definition that is applicable throughout Title II.

Applicants offer two responses to this analysis. *First*, they contend that courts have recognized that, when the same term appears in two different sections of a statute, that term may be construed in different ways – as, for example, when the Commission in the *Qwest* case construed the term "provide" in Section 271 of the Act different from the way it construed "provide" in Section 275 of the Act. *See* May 18 Letter at 7 But that was because, as the D.C. Circuit explained in affirming the Commission's decision, "*neither the word 'provide' nor the phrase 'provide interLATA services' is anywhere defined in the Act.*" *U S WEST* v. *FCC*, 177 F.3d 1057, 1059 (D.C. Cir. 1999) (emphasis added). By contrast, when Congress establishes a single definition for a statute, it does so precisely in order to ensure a uniform treatment. What is dispositive is that, unlike the *Qwest* case, where the Commission was construing *two* statutory provisions (Section 271 and 275), here it is only called upon to construe *one* (Section 3(1)) – and it is axiomatic that the words in a single statutory provision always mean the same thing.[7]

Second, Applicants rely on the fact that the preface to the Definitions section of the Act states that all the definitions there apply "unless the context otherwise requires." May 18 Letter at 6 (quoting Section 3). That language cannot bear the weight Applicants would ascribe to it. The D.C. Circuit authoritatively construed the phrase "unless the context otherwise requires" – which also appears in the Definitions section of the securities laws and elsewhere – in *American Bankers Assoc.* v. *SEC*, 804 F.2d 739 (D.C. Cir. 1986). The D.C. Circuit there squarely rejected the argument that this phrase "refers to out-of-Act market or regulatory circumstances," holding that the "context" to which it refers is instead confined to "in-Act textual contexts" – *i.e.*, the particular words used in a statute. *Id.* at 753. It further held that this clause "mean[s] only that if in the case of a frequently occurring statutory term, its immediate context suggests that a literal application of the statutory definition would produce absurd consequences or run counter to the obvious thrust of the section, the agency may appropriately modify the definition." *Id.* Applicants cannot point to any words in Section 271 that even suggest that interpreting

[7] Applicants also note (May 18 Letter at 6-7) that some of the inquiry under Section 3(1) will be "fact-specific." That is true, but it does not advance their argument. It will always be the case that the application of Section 3(1) will depend on the particular facts presented. But the relevant point here the same facts must always produce the same conclusion, regardless of whether "affiliation" is being determined with respect to Section 271 or any other provision of the Act to which Section 3(1) applies.

"affiliate" in that section the same as in other sections that rely on Section 3(1) would produce an "absurd" result or be contrary to "the obvious thrust of the section."

Respectfully submitted,

Peter D. Keisler

cc: Dorothy Attwood
Rebecca Beynon
James Bird
Michelle Cary
Kyle Dixon
Jordan Goldstein
Johanna Mikes
Howard Shelanksi
Paula Silberthau
Lawrence Strickling
Sarah Whitesell
Christopher Wright